

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**Examiner: J. LU; Art Unit: 3749; Docket No.: 3156**

**In RE: Application of Detlef MATTINGER, et al**

**Ser. No.: 10/520,305**

**Filing Date: January 5, 2005**

**Title: HAIR DRYER WITH DETACHABLE ROTATABLE AIR  
NOZZLE ATTACHMENT FOR PRODUCING  
SIDE-BY-SIDE HOT AND COLD AIR STREAMS**

December 27, 2007

**APPEAL BRIEF**

Hon. Commissioner of Patents  
and Trademarks,  
Washington, D.C. 20231

Sir:

In response to the final Office Action dated May 31, 2007 and the advisory action dated October 12, 2007, please consider the following arguments for overturning the rejections of the pending claims of the above-identified U.S. Patent Application:

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## **I. REAL PARTY IN INTEREST**

The real party in interest is WELLA AG, which owns 100 % of the above-identified U.S. Patent Application and which is now a subsidiary of PROCTER AND GAMBLE.

## **II. RELATED APPEALS AND INTERFERENCES**

There are no related appeals and interferences.

### **III. STATUS OF THE CLAIMS**

1. Claims 1 to 23 and 30 were canceled; claims 24 to 29 and 31 to 34 are currently pending.
2. Claims 24, 27, and 29 were rejected under 35 U.S.C. 102 (b) as anticipated by Guenin (EP 0 970 633).
3. Claims 25 to 26, 28, and 31 to 33 were rejected under 35 U.S.C. 103 (a) as obvious over Guenin (EP 0 970 633).
4. Claim 34 was rejected under 35 U.S.C. 103 (a) as obvious over Guenin (EP 0 970 633), in view of Hubbuch (G 9100860.3).

#### **IV. STATUS OF THE AMENDMENT AFTER FINAL ACTION**

1. A request for reconsideration, which only contained argumentation to overcome the anticipation and obviousness rejections, was filed on September 27, 2007. No claim changes were proposed.
2. The advisory action dated October 12, 2007 stated the arguments in the request for reconsideration were not sufficient to put the application in a condition for allowance because the pending claims did not “structurally define” over the prior art.

## **V. SUMMARY OF THE CLAIMED SUBJECT MATTER**

The page and line numbers in parentheses in the following summary of the claimed subject matter refer to the location of that subject matter in the appellants' amended specification. In addition to the specification filed on January 5, 2005, the latest amended version of some paragraphs of the specification appears in the amendments of September 15, 2006 and March 13, 2007.

The drawing figure reference number immediately following a recited element of the claimed invention in the following summary of the claimed subject matter is the reference number of that element in amended figures 1 to 7. The latest acceptable version of amended figures 1 to 7 is appended to the amendment dated March 23, 2006.

This summary of the claimed subject matter is divided into two parts. The first part describes the subject matter of the sole independent claim 34 for a hair dryer that comprises a detachable air nozzle attachment for simultaneously generating side-by-side hot and cold air streams and a second air nozzle attachment for producing only a hot air stream. The second part describes the subject matter of the remaining independent claim 24 for the detachable air nozzle attachment the produces the hot and cold air streams.

## **1. INDEPENDENT HAIR DRYER CLAIM 34**

Although hair dryers that produce dual air streams of both hot and cold air were previously known in the art, appellants have produced a hair dryer of this general type that has a simpler structure and is more economical to produce (page 1, lines 18 to 21, of the originally filed specification).

The hair dryer (2) according to claim 34 has a fan (3) and heater(4) for generating a central hot air stream (5) and a concentric cold air stream (6) at a blower opening (7) (Page 2, lines 12 to 15, of the original specification filed on January 5, 2005; figs. 3 and 1). The hair dryer (2) of claim 34 is equipped with a first air nozzle attachment (8) (page 2, lines 17 to 22, of the original specification; figs. 4 and 5) and a second air nozzle attachment (23) for optional usage (page 4 of the original specification, fig. 7).

The wording “a fan and a heater for generating a central hot air stream and a cold air stream concentric to the central hot air stream at the blower opening (7)” in claim 4 should be interpreted in accordance with the 6<sup>th</sup> paragraph of 35 U.S.C. 112 as “means for performing a certain function”. The reason is that the term “heater” in claim 34 is exactly equivalent to the term “heating means”. It means no more or no less than that. Thus in accordance with the guidelines in M.P.E.P. 2181 appellants respectfully submit that even through the phrase “means for” is not explicitly present in lines 1 and 2 of claim 34, the foregoing claim limitation in quotes is written as a function to be performed and

does not recite sufficient structure or material for performing the function, i.e. producing the central hot air stream and the concentric cold air stream at the blower opening (7), so that it should be interpreted according to the 6<sup>th</sup> paragraph of 35 U.S.C. 112.

Nevertheless the wording “a fan and a heater for generating a central hot air stream and a cold air stream concentric to the central hot air stream at the blower opening (7)” complies with the written description requirement of 35 U.S.C. 112, first paragraph, because there is explicit support for the wording on page 2 of the originally filed specification as noted above. Also the foregoing limiting wording complies with the enablement requirement of 35 U.S.C. 112, first paragraph, because the figs. 1 and 3 of the present application clearly show an electrical wire of an electric heater. Such electric heaters are notoriously well known in the art in general and in the electric hair dryer field. Thus one skilled in the art would have no difficulty regarding the details of constructing the electric heater, which details are not part of the present invention claimed in claim 34. In addition to the fan the individual elements that are necessary to perform the function, which are not included in claim 34, namely generating a central hot air stream and a cold air stream concentric to the central hot air stream at the blower opening (7), include the partition 22 (page 5 of appellants’ original specification, shown in fig. 1), which keeps the cold air stream from mixing with the hot air stream downstream of the blower opening (7), and the electric heater wire.

Thus it is respectfully submitted that claim 34 includes structural limitations, namely means for producing a **central** hot air stream (5) and a

**concentric** cold air stream (6) at blower opening (7), which are available to help distinguish the claim from the cited prior art. Of course these structural limitations must be limited to the structure necessary to perform the desired function, which is shown in figures 1 and 3 of the above-identified originally filed application or to equivalents thereof in accordance with the 6<sup>th</sup> paragraph of 35 U.S.C. 112.

The second air nozzle attachment (23) only produces a hot air stream (9) (page 4 of the original specification and in the amendment dated September 15, 2006, fig. 7). The second air nozzle attachment (23) can be used selectively instead of the first air nozzle attachment (8) to produce only the single hot air steam (9) (lines 3 to 4 of page 4 in the original and amended specification). The embodiment of the second air nozzle attachment (23) shown in fig. 7 only passes the hot air stream produced by the heater (4) because it is structured to block the cold air stream (6).

The first air nozzle attachment (8) of claim 34 is connectable to the blower opening (7) and outputs a hot air stream (9) and a cold air stream (10), which are located side-by-side, from the central hot air stream (5) and the cold air stream (6) available at the blower opening (7) (page 2, lines 17 to 22, original specification, fig. 1). The air nozzle attachment (8) comprises hot air and cold air nozzles (13, 14) located side-by-side (page 2, lines 27 to 28, of the originally filed specification, figs. 4 and 5). The air nozzle attachment (8), on an end connectable with the blower opening (7), has a **central** conduit entrance (11) opening into the hot air nozzle (13) and a **coaxial** conduit entrance (12) that is coaxial to the central conduit entrance opening into the cold air nozzle (14) (page

2, lines 22 to 27, figs. 5 and 6).

An important feature of the claimed apparatus of claim 34 is that the first air nozzle attachment (8) is connectable over the blower opening (page 2, line 18, of the original specification) but also detachable (page 3, line 22, of the original specification). This means that the air nozzle attachment (8) can be disconnected and reconnected over the blower opening according to usage. The embodiment shown in fig. 1 has a snap-on connection (18) for this purpose but the snap-on connection is not mentioned in claim 34.

When the first air nozzle attachment (8) is removed the second air nozzle attachment (23) can be connected over the blower opening (7) as explained on page 4 of the original specification, especially lines 3 to 4, so that only a single hot air stream (9) is provided by the air dryer (2). Thus the specification clearly teaches that the same hair dryer (2) can produce either a single hot air stream (9) or side-by-side air streams (9, 10) that are respectively hot and cold in the last paragraph on page 4 by selective use of either the first air nozzle attachment (8) or the second air nozzle attachment (23).

## **2. INDEPENDENT AIR NOZZLE ATTACHMENT CLAIM 24**

The first air nozzle attachment (8) that is easily connectable over the blower opening and detachable from it with simple snap-on connection (18) is separately claimed in claims 24 to 29 and 31 to 33. Most of the features of the air nozzle attachment (8) have been explained in connection with the explanation of

the hair dryer claimed in claim 34; however they are repeated here again for convenience herein below. Note particularly that the snap-on connection (18) is included in independent claim 24, although not in claim 34.

The first air nozzle attachment (8) of claim 34 is connectable to the blower opening (7) and outputs a hot air stream (9) and a cold air stream (10), which are located side-by-side, from the central hot air stream (5) and the cold air stream (6) available at the blower opening (7) (page 2, lines 17 to 22, original specification, fig. 1). The air nozzle attachment (8) comprises hot air and cold air nozzles (13, 14) located side-by-side (page 2, lines 27 to 28, of the originally filed specification, figs. 4 and 5). The air nozzle attachment (8), on an end connectable with the blower opening (7), has a **central** conduit entrance (11) opening into the hot air nozzle (13) and a **coaxial** conduit entrance (12) that is coaxial to the central conduit entrance opening into the cold air nozzle (14) (page 2, lines 22 to 27, figs. 5 and 6).

The first air nozzle attachment (8) is connectable over the blower opening (page 2, line 18, of the original specification) but also detachable (page 3, line 22, of the original specification). This means that the air nozzle attachment (8) can be disconnected and reconnected over the blower opening (7) according to usage. The snap-on connection (18) for this purpose is disclosed on page 3, lines 19 to 22, of the originally filed specification. Such snap-on connections are well known and were not described in detail, since the invention should not be limited to any particular snap-on connection.

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

- (1) Whether air nozzle attachment claims 24, 27 and 29 are anticipated under **35 U.S.C. 102 (b)** over Guenin (EP 0 970 633).
- (2) Whether air nozzle attachment claims 25, 26, 28, and 31 to 33 are unpatentable under **35 U.S.C. 103 (a)** over Guenin (EP 0 970 633).
- (3) Whether or not hair dryer claim 34 is unpatentable under **35 U.S.C. 103 (a)** over Guenin (EP 0 970 633) in view of Hubbuch (G 9100860.3).

## VII. ARGUMENTATION

Argumentation to show that the aforesaid rejections of the claims based on Guenin (referred to as EP '633 herein below) and Hubbuch (referred to as G '860 herein below) should be overturned is presented in this section. Each ground of rejection is considered separately.

### 1. ANTICIPATION REJECTION OF CLAIMS 24, 27 and 29

The issue considered in this part of the argumentation section is whether air nozzle attachment claims 24, 27 and 29 are anticipated under **35 U.S.C. 102 (b)** over Guenin (EP 0 970 633).

The claimed air nozzle attachment of claim 24 has clearly distinguishable structural differences from the disclosed air nozzle attachment (23, claim 5 of EP '633). The structural differences are included in the last four lines of claim 24, which are quoted herein below:

**"the air nozzle attachment (8), on an end connectable with the blower opening (7), is provided with a *central* conduit entrance (11) and a *coaxial* conduit entrance (12) *coaxial* to the central conduit entrance (11)".**

The terms "central" and "coaxial" define significant structural features of the claimed nozzle attachment, which are different from the structure disclosed and claimed in EP '633.

EP '633 does **not** disclose or suggest or claim an air attachment nozzle for simultaneous hot and cold air streams that has a central conduit entrance and a coaxial conduit entrance that is coaxial to the central conduit entrance on the end of the nozzle that is attached over the blower opening. The side view shown in fig. 1 of EP '633 is misleading because the first conduit (8) in the body of the dryer of EP '633 rotates when the rotating air attachment nozzle of EP '633 is rotated (see paragraph [0052] of EP '633). It should be appreciated that the hair dryer is a three-dimensional article, that fig. 1 and fig. 2 of EP '633 are side and top views respectively, that the first conduit (8) is shown in only one particular rotational orientation and that the axis of first conduit (8) is inclined to and not coaxial with the axis of the front part (2 -- cold air conduit 10) shown in figs. 1 and 2 of EP '633.

The meanings of the terms "coaxial" and "concentric" used in appellants' claim 24 would be apparent to one of ordinary skill in the art because they are the ordinary dictionary meanings of these terms in accordance with M.P.E.P. 2173. The term "coaxial" according to Webster's Dictionary has a simple meaning without confusing different connotations for different fields of art. It means having "coincident axes", i.e. axes that are superimposed on each other. The term "concentric" means having a common center. These meanings can be found in various abridged editions of Webster's Dictionary.

In contrast to EP '633, figs. 5 and 6 of appellant's disclosure support the structural limitation quoted from claim 24 above because fig. 6 shows a circular cross-sectioned entrance (11) to the air nozzle attachment (8), which is arranged

centrally in the end of the attachment (8) that is connected over the blower opening (7); i.e. it is a central conduit entrance. Appellant's fig. 6 also shows that the annular or ring-shaped entrance (12) to the air nozzle attachment (8) is coaxial to the central conduit entrance (11).

Fig. 3b of EP '633 more clearly shows the structural differences between the nozzle attachment of the prior art and of the present invention. Fig. 3b shows a back or rear view of the air attachment nozzle (23) according to paragraph [0031] of EP '633. The entrance 27 to the nozzle (23) of EP '633 for the hot air stream according to paragraph [0050] has a circular cross-section, but is offset from the center of the end of the nozzle attachment so that it is not central. Fig. 3b also shows that the entrance for the cold air stream, which is unlabeled but shown in fig. 3b and has a cross-section shaped like the moon in 3/4 phase. In other words, it does not have an annular or ring-shaped cross-section like appellant's entrance for the cold air stream.

Thus the entrances for the hot air stream and the cold air stream in air nozzle attachment (tube 23) of EP '633 do not even overlap each other according to fig. 3b, but are only next to each other. Thus the entrances for the hot and cold air streams cannot have a common center and they cannot be concentric or coaxial according to claim 24. Furthermore the hot air entrance is space axially forward of the cold air entrance in figs. 1 and 2 of EP '633 so that there is no way to construct coincident axes through the cold air entrance and hot air entrance shown in figs. 1 to 3b of EP '633.

**None** of the claims of EP '633 claim a hair dryer with an air nozzle

attachment with the structural limitation that the hot air stream entrance and the cold air stream entrance have common axes or have cross-sections that are concentric.

The air nozzle attachment with the structural limitation according to the last several lines of claim 24, which are quoted above, has significant advantages over air nozzle attachment (23) in the hair dryer claimed in EP '633. The circular cross-sectioned entrance for the hot air stream is displaced to one side of or offset in the nozzle attachment (not central), so that hot air directly contacts the outer side wall of the air nozzle attachment in the vicinity of the blower opening. The air nozzle attachments of EP '633 necessarily have a hot wall section on this outer side wall that can burn the treated person, which is not present in appellant's claimed air nozzle attachment. In some embodiments claimed by claim 1 of EP '633 apparently the hot air nozzle (17) is entirely separate and on one side of the cold air nozzle (19).

The non-coaxial structural arrangement of the air stream entrances of the air nozzle attachment is necessary according to the embodiments shown in the figures of EP '633, because the hot air conduit (8) for the hot air stream in the hair dryer of EP '633 is inclined to, not coaxial with, the conduit (10) for the cold air stream in the body of the hair dryer, so that the circular open end of the hot air conduit (8) rotates with the rotating nozzle (23) around the open end of part (2) (again see fig. 3b) to position the hot air stream as desired by the user of the hair dryer (see claim 6, fig. 2, and paragraphs [0023] and [0024] of EP '633). As a result as explained in paragraphs [0061] and [0062] this structure and the

rotatability of the air nozzle attachment 23 of EP '633 permit the hot air stream to be adjusted with the movements of the hair dresser.

Appellants' subtle structural arrangement and shapes of the central hot air entrance opening and the coaxial cold air entrance opening on the end attached to the body of the hair dryer provide significant safety advantages over the structure of the air nozzle attachment shown in figs. 1 to 3b and claimed in the claims of EP '633. One entire side of the air nozzle attachment (23) of EP '633 remains hot because it is the wall of the hot air duct (25) as shown in fig. 2 and 3b of EP '633. In contrast in the air nozzle attachment (8) claimed in appellant's claim 24 the hot air flow through the air nozzle attachment (8) is confined to the center of the air nozzle attachment over most of the axial extent of the air nozzle attachment, because the circular inlet entrance for the hot air is centered in the end of the air nozzle attachment (8) connected over the blower opening and is surrounded by cold air. Thus the air nozzle attachment (8) has a cold outer wall around its entire circumference, at least until the tip region of the air nozzle attachment where the wall of the hot air nozzle meets the wall of the cold air nozzle in the embodiment shown in the figures 5 and 6 of appellants' original specification.

In addition, this structural difference between the air nozzle attachment of claim 24 and that disclosed in EP '633 facilitates a much simpler dryer structure with fewer moving parts, as explained below in connection with claim 34. The hair dryer of claim 1 of EP '633 includes a rotating central tube, whereas the preferred embodiment of appellant's claimed hair dryer has a stationary partition

(22) in the form of a central tube that separates the hot air stream from the cold air stream. More moving parts in the hair dryer result in more wear and maintenance problems. Also the assembly during manufacture is more complicated. Nevertheless the air attachment nozzle in the preferred embodiment of claim 29 is still rotatable and still provides the benefits that a rotatable nozzle provides but has a larger cooler outer wall surface than that of EP '633.

It is well established that each and every limitation of a claimed invention must be disclosed in a single prior art reference in order to be able to reject the claimed invention under 35 U.S.C. 102 (b) based on the disclosures in the single prior art reference. See M.P.E.P. 2131 and also the opinion in *In re Bond*, 15 U.S.P.Q. 2nd 1566 (Fed. Cir. 1990).

EP '633 does not disclose or suggest the above-described structural limitations that provide a cooler air nozzle attachment wall around the entire circumference of the entrance to the air nozzle attachment. This provides an improved nozzle attachment that is less likely to burn the scalp by accidental contact of the nozzle attachment.

According to the advisory action of October 12, 2007, the appellants' claim 24 fails "to structurally define over the prior art". Appellants respectfully disagree because the above-described limitations regarding the arrangement and shape of the entrances to the nozzle attachment are structural limitations that are neither disclosed nor suggested by the disclosures in EP '633 and the other prior art references that are of record in the present application.

The embodiments claimed in the dependent claims 27 and 29 are not anticipated by EP '633 because they include the subject matter of claim 24.

For the foregoing reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claims 24, 27, and 29 under 35 U.S.C. 102 (b) as anticipated by Guenin (EP 0970633).

## **2. OBVIOUSNESS REJECTION OF CLAIMS 25, 26, 28, and 31 to 33**

The issue considered in this part of the argumentation section is whether air nozzle attachment claims 25, 26, 28, and 31 to 33 are unpatentable under **35 U.S.C. 103 (a)** over Guenin (EP 0 970 633).

Dependent claims 25, 26, 28, and 31 to 33 depend on claim 24 and thus include the subject matter of claim 24 with all the limitations present in claim 24. For that reason each of claims 25, 26, 26, and 31 to 33 include the structural limitations that are recited in the last part of claim 24, which are quoted herein below:

“the air nozzle attachment (8), on an end connectable with the blower opening (7), is provided with a *central* conduit entrance (11) and a *coaxial* conduit entrance (12) *coaxial* to the central conduit entrance (11)”.

These nozzle attachment limitations are subtle structural differences that are not disclosed or suggested by any other prior art reference, especially by EP '633. However, as explained above in connection with the anticipation rejection, these subtle structural differences provide an air nozzle attachment that has cooler outer wall portions than the air nozzle attachment 23 of EP '633, which

provides an improvement in safety during usage, particularly reducing the possibility of burns or discomfort.

Claim 1 of EP '633 reads on embodiments in which the hot air nozzle (17) is physically separate from the cold air nozzle (19). When these prior art nozzles have a common wall as in the embodiment of figures 1 to 3b of EP '633 one side of the two joined-together nozzles is still hot because the wall of the hot air nozzle is the outside wall of the tube (23). EP '633 never suggests the above-quoted structural limitations and provides no hints by which one skilled in the art would arrive at the structure claimed in appellants' claim 24.

The differences between the structure claimed in appellants' claim 24 and that disclosed in EP '633 are not inconsequential, but instead are significant, as explained above in the section on anticipation. They provide an improved safer air nozzle attachment than that disclosed in the EP '633, which is less likely to burn the user.

There is no disclosure in EP '633 that would lead on skilled in the art to the air nozzle attachment with the above-quoted structural features and limitations. For example, the justices of the C.C.P.A. have said:

"In determining the propriety of the Patent Office case for obviousness in the first instance, it is necessary to ascertain whether or not the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the references before him to make the proposed substitution, combination or other modification." *In re Lintner*, 173 U.S.P.Q. 560, 562 (C.C.P.A. 1972).

There is clearly no disclosure in EP '633 that is sufficient to motivate one

skilled in the art to make the air nozzle attachment with the above-quoted structural limitations according to claim 24.

Also more recently the Federal Circuit Court of appeals has decided the issue of patentability of a claimed invention using the TSM test (teaching-suggestion-motivation test). Many of their judicial opinions hold that to reject a claimed invention under 35 U.S.C. 103 (a) there must be some hint or suggestion in the prior art of the modifications of the disclosure in a prior art reference or references used to reject the claimed invention as unpatentable for a valid rejection under 35 U.S.C. 103 (a). For example, the Court of Appeals for the Federal Circuit has said:

"Rather, to establish obviousness based on a combination of elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant...Even when obviousness is based on a single reference there must be a showing of a suggestion of motivation to modify the teachings of that reference.."*In re Kotzab*, 55 U.S.P.Q. 2<sup>nd</sup> 1313 (Fed. Cir. 2000) -- see also M.P.E.P. 2141.

Although a proper application of these principles requires consideration of the prior art in general, it is certainly true that there is no suggestion of the distinguishing limitations that are quoted above in EP '633 itself. Also it is respectfully submitted that no prior art reference is of record in this application, which would suggest the identified distinguishing limitations in claim 24. Furthermore these subtle structural differences for the hot and cold air entrances of the nozzle attachment are the opposite of obvious for one of ordinary skill in

the art, who knows the art of designing and using hair dryers.

More recently, the Supreme Court has considered the issue of patentability of a claimed invention and has found the TSM test to be deficient, at least in its application in the case of many U.S. Patent Applications (*KSR Int'l Co. v. Teleflex, Inc.* (U.S. No. 04-1350)). However the justices still maintained that there must at least be some reason that the prior art reference or prior art references suggest the claimed invention for a valid rejection under 35 U.S.C. 103 (a).

However the Federal Circuit Court of Appeals has reconciled the Supreme Court opinion in *KSR Int'l Co. v. Teleflex, Inc.* with many of its previous opinions based on the TSM test in *Alza Corporation v. Mylan Laboratories, Inc.* :

“A suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art, as “the teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references.... The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art.” **However, rejections on obviousness grounds cannot be sustained by mere conclusory statements** [emphasis ours]; instead, there must be *some* articulated reasoning with *some* rational underpinning to support the legal conclusion of obviousness. This requirement is as much rooted in the Administrative Procedure Act [for our review of Board determinations], which ensures due process and non-arbitrary decision making, as it is in § 103.

441 F.3d at 987-88 (quoting *In re Kotzab*, 217 F.3d 1365, 1370 (Fed. Cir. 2000)) (citations omitted) (emphases added)). There is flexibility in our obviousness jurisprudence because a motivation may be found *implicitly* in the prior art. We do not have a rigid test that requires an actual teaching to combine before concluding that one of ordinary skill in the art would know to combine references. This approach, moreover, does not exist merely in theory but in practice, as well. Our recent decisions in *Kahn* and

in [*Cross Med. Prods., Inc., v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293 (Fed. Cir. 2005)] amply illustrate the current state of this court's views."

This Federal Circuit quote taken from *Alza Corporation v. Mylan Laboratories, Inc.*, Fed. Cir., No. 06-1019, 9/6/06.

The final Office Action and the advisory action have not recognized the structural limitations in the quoted section of claim 24, namely that

"the air nozzle attachment (8), on an end connectable with the blower opening (7), is provided with a *central* conduit entrance (11) and a *coaxial* conduit entrance (12) *coaxial* to the central conduit entrance (11)".

For example, the advisory action merely states the appellants' claims failed to structurally define over the prior art. However appellants respectfully disagree with this opinion for the foregoing reasons because of the structural relationships of position and location for the entrances to the air nozzle attachment in the above-quoted section of claim 24.

Under the anticipation rejection on pages 2 and 3 of the final Office Action the final Office Action merely repeats the wording of claim 24 with some drawing reference numbers of EP '633 without considering the limiting terms "concentric" or "coaxial". There is no explanation under the anticipation rejection of the source of these features and limitations in EP '633.

Under the section that explains the obviousness rejection in the final Office Action only features of the dependent claims 25, 26, 28, and 31 to 33 are mentioned and considered, because the final Office Action does not recognize any structural differences between the subject matter of claim 24 and the disclosures in EP '633.

Thus no reason for the obviousness rejection of the claimed subject matter of claim 24 or dependent claims 25, 26, 28, and 31 to 33, i.e. no reason why the prior art suggests the above limitations regarding the shape, location and arrangement of the entrance of the hot air stream and the entrance of the cold air stream to the claimed air nozzle attachment that are present in claim 24 has been provided in either the advisory action or the final Office Action.

Thus for the foregoing reasons it is respectfully submitted that EP '633 does **not** establish a case of *prima facie* obviousness of the subject matter of claim 25, 26, 28, and 31 to 33, or of independent claim 24.

For the foregoing reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claims 25, 26, 28, and 31 to 33 under 35 U.S.C. 103 (a) as unpatentable over Guenin (EP 0 970 633).

### 3. OBVIOUSNESS REJECTION OF CLAIM 34

The issue considered in this part of the argumentation section is whether hair dryer claim 34 is unpatentable under **35 U.S.C. 103 (a)** over Guenin (EP 0 970 633), in view of Hubbuch (G 9100860.3).

Claim 34 is a claim for a hair dryer that includes the air nozzle attachment (8) as defined by claim 24 (with the exception of the snap-on coupling (18)), a second air nozzle attachment for optional usage, and a fan and heater for producing the central hot air stream (5) and the coaxial cold air stream (6) in the

body of the hair dryer shown in appellants' figures 1 and 2.

Because claim 34 contains all the features and limitations of claim 24, except for the snap-on coupling (18), EP '633 does not disclose or suggest the subject matter of claim 24.

The question for this part of the argumentation section is whether G '860 discloses the limitations that are absent from the disclosures of EP '633 or suggests the modifications of EP '633 that are necessary to arrive at the invention as claimed in claim 24 and thus those feature and limitations that appear in claim 34. Appellant respectfully submits that G '860 does not disclose or suggest the structural distinguishing limitations present in claim 24, namely that

**"the air nozzle attachment (8), on an end connectable with the blower opening (7), is provided with a *central* conduit entrance (11) and a *coaxial* conduit entrance (12) *coaxial* to the central conduit entrance (11)".**

In fact, G '860 (Hubbuch) **teaches and claims the opposite** from the foregoing limitations because this reference teaches that the two air streams passing through the "nozzle" (3) or air nozzle attachment (3) are **completely separated** by an intermediate wall (12) (See figs.3 and 4 of G '860; an English translation of its abstract and/or claim 1). In addition, the two air streams are **completely separate** by the middle wall (10) in the body of the hair dryer (1).

A prior art reference that teaches the opposite from a claimed invention should not be combined under 35 U.S.C. 103 (a) with another reference to reject the claimed invention according to M.P.E.P. 2145 X and various judicial

decisions cited in the M.P.E.P. Completely separate side-by-side air streams are the opposite from an arrangement comprising a central air stream and a coaxial air stream that is coaxial with the central air stream.

Of course the same goes for the hair dryer structure necessary to provide these different flows; if the flows are opposite from each other, the structure required for the flows cannot be the same or similar.

The two air streams emerging from air nozzle attachment 3 of G '860 are indeed side-by-side, but they are also side-by-side in the air nozzle attachment and in the body of the hair dryer. This is the opposite arrangement from a cold air stream that has an annular cross-section and is coaxial with a central hot air steam in the entrance portion of the air nozzle attachment, as in the case of appellant's claimed invention.

More precisely in terms of the exact wording of claim 24, the entrances for the two side-by-side air streams produced by the body of the hair dryer disclosed in G '860 must be side-by-side as shown in fig. 4 of G '860 and as claimed in claim 1 of G '860. These entrances do not overlap in any way so that one entrance cannot be coaxial or central with respect to the other entrance. Thus the embodiment of the hair dryer shown in figs 1 to 7 of G '860 does not have the structural features of the above-quoted limitation that is present in claim 24 and also in claim 34.

In addition, there are other important differences between the hair dryer according to appellant's claim 34 and a hair dryer that would be suggested by a combination of EP '633 and G '860. As noted in the summary of invention section

herein above, the term “heater” in claim 34 is equivalent to “means for heating” in accordance with M.P.E.P. 2181 and should be so interpreted under the sixth paragraph of 35 U.S.C. 112, because indeed claim 34 does not recite sufficient structure, material, or acts which would preclude application of 35 U.S.C. 112, sixth paragraph.

Thus the first several lines of claim 34 contain the wording:

“fan and a heater for generating a central hot-air stream and a cold-air stream concentric to the central hot-air stream at a blower opening (7)”.

Appellants respectfully submit that this wording should be interpreted to mean the following:

“means for generating a central hot air stream and a cold air stream that is concentric to the central hot air stream at a blow opening (7)”,

and that the sixth paragraph of 35 U.S.C. 112, second paragraph applies.

The prior art references of record, EP ‘633 and G’ 860, neither disclose nor suggest means for generating a **central** hot air stream and a cold air stream that is **concentric** to the **central** hot air stream.

Claim 1 of EP ‘633 does not limit the means for generating hot and cold air streams that are limited to being central and concentric thereto.

As noted above in the first part of this argumentation section the term “concentric” means that the flows or streams have a common center or are coaxial to each other. Figs. 1 and 2 of EP ‘633 show that the hot air stream for the single disclosed embodiment of their hair dryer has an approximately constant circular cross-section, but has a longitudinal axis that is inclined to the central axis of the body of the dryer. The cross-section of the cold air stream is

best appreciated in connection with fig. 3b and is approximately shaped like a 3/4 moon at the outlet end of duct (8). Thus the cross-sections of the cold air stream and the hot air stream are clearly not concentric. The flows in the tube or nozzle 23 of EP '633 are side-by-side and not concentric.

Claim 1 of G '860 clearly limits the two air streams to side-by-side air streams, which are separated by intervening or intermediate walls in all parts of the hair dryer. Thus G' 860 would lead one skilled in the art away from a means for generating a central hot air stream and a coaxial cold air stream that has a cross-section that is concentric with the cross-section of the central hot air stream.

The embodiment shown in the figures of G '860 is further evidence that G '860 would lead one skilled in the art away from the hair dryer claimed in claim 34.

Furthermore neither hair dryer of G' 860 nor the hair dryer of EP '633 has two air nozzle attachments, one of which produces a single hot air stream when attached to the body of the hair dryer over the outlet opening (7) and the other of which simultaneously produces a side-by-side hot and cold air streams when attached to the body of the hair dryer over the outlet opening (7).

Appellants respectfully submit that the two air nozzles attachments of claim 34 are interchangeable and can be used selectively, i.e. according to choice of the user, with the hair dryer shown in the appellant's figures, although the appellants' specification does not explicitly use the term "interchangeable" with regard to the two nozzle attachments. Appellants have shown that there is

support for the detachability of the first air nozzle attachment (8) at page 3, line 22, of the originally filed specification and the title was amended accordingly by the amendment filed in March of 2006. Page 4, lines 3 to 5, of the originally filed specification states that the second air nozzle attachment (23) is used selectively for producing only a hot air stream. Appellants respectfully submit that the term "selectively" and the detachability of the first air nozzle attachment are sufficient basis for interchangeability of the two nozzles.

For the foregoing reasons Honorable Board of Patent Appeals and Interferences is respectfully requested to overturn the rejection of claim 34 as unpatentable under 35 U.S.C. 103 (a) over Guenin (EP 0 970 633), in view of Hubbuch (G 9100860.3).

## **VIII. APPENDIX OF CLAIMS**

A clean copy of the pending claims on appeal follows herein below.

24. An air nozzle attachment (8) for a hair dryer, said hair dryer (2) having a fan and a heater for generating a central hot-air stream (5) and a concentric cold-air stream (6) concentric to the central hot-air stream at a blower opening (7), wherein the air nozzle attachment (8) is connectable to the blower opening (7) by means of a snap-on connection (18) and produces a hot-air stream (9) and a cold-air stream (10) from the central hot-air stream (5) and the concentric cold-air stream (6) of the hair dryer (2), wherein said hot-air stream (9) and said cold-air stream (10) produced by the air nozzle attachment (8) are arranged side-by-side, wherein the air nozzle attachment (8) comprises a hot-air nozzle (13) and a cold-air nozzle (14) located side-by-side, wherein the air nozzle attachment (8), on an end connectable with the blower opening (7), is provided with a central conduit entrance (11) and a coaxial conduit entrance (12) coaxial to the central conduit entrance (11), and wherein the central conduit entrance (11) opens into the hot-air nozzle (13) and the coaxial conduit entrance (12) opens into the cold-air nozzle (14), and wherein the air nozzle attachment (8) is detachable from the blower opening (7).

25. The air nozzle attachment as defined in claim 24, wherein the hot-air nozzle (13) and the cold-air nozzle (14) are each formed as a flat nozzle (15) and the hot-air nozzle (13) and the cold-air nozzle (14) have respective flat sides on each other.

26. The air nozzle attachment as defined in claim 24, wherein the hot-air nozzle (13) and the cold-air nozzle (14) have at least approximately equal blower cross sections (16, 17).

27. The air nozzle attachment as defined in claim 24, wherein the hot-air nozzle (13) has a smaller blower cross-section (16) than a blower cross section (17) of the cold-air nozzle (14).

28. The air nozzle attachment as defined in claim 24, wherein the hot-air nozzle (13) and the cold-air nozzle (14) end at the same length.

29. The air nozzle attachment as defined in claim 24, wherein the air nozzle attachment (8) is axially connectable to the hair dryer (2) in the region of the blower opening (7) so as to be rotatable to any angular position.

31. The air nozzle attachment as defined in claim 24, wherein the air nozzle attachment (8) comprises heat-resistant plastic (19).

32. The air nozzle attachment as defined in claim 24, wherein an outer part of the hot-air nozzle (13) and an outer part of the cold-air nozzle (14) have different visual appearances and are visually distinguishable from each other.

33. The air nozzle attachment as defined in claim 32, wherein the outer part (20) of the hot-air nozzle (13) has a red color, and the outer part (21) of the cold-air nozzle (14) has a blue color, whereby the hot-air nozzle (13) and the cold-air nozzle (14) are visually distinguishable from each other.

34. A hair dryer (2) having a fan and a heater for generating a central hot-air stream and a cold-air stream concentric to the central hot-air stream at a blower opening (7), a first air nozzle attachment, and a second air nozzle attachment (23) for optional usage;

wherein said second air nozzle attachment (23) only produces a hot air stream (9), and

wherein said first air nozzle attachment (8) is connectable to the blower opening (7) and produces a hot-air stream (9) and a cold-air stream (10) from said central hot-air stream (5) and said concentric cold-air stream (6), wherein said hot-air stream (9) and said cold-air stream (10) produced by the first air nozzle attachment (8) are arranged side-by-side, wherein the air nozzle attachment (8) comprises a hot-air nozzle (13) and a cold-air nozzle (14) located side-by-side, wherein the first air nozzle attachment (8), on an end connectable with the blower opening (7), is provided with a central conduit entrance (11) and

a coaxial conduit entrance (12) coaxial to the central conduit entrance (11), and wherein the central conduit entrance (11) opens into the hot-air nozzle (13) and the coaxial conduit entrance (12) opens into the cold-air nozzle (14) and wherein the first air nozzle attachment (8) is detachable from the blower opening (7).

## **IX. EVIDENCE APPENDIX**

**NONE**

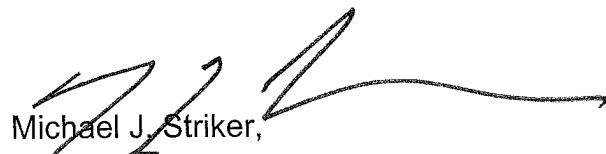
## **X. RELATED PROCEEDINGS**

**NONE**

## XI. SIGNATURE

In view of the foregoing, favorable allowance is respectfully solicited.

Respectfully submitted,



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